

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND LAMONTE WAITS,

Defendant-Appellant.

UNPUBLISHED

September 20, 2005

No. 255871

Kent Circuit Court

LC No. 03-000882-FH

Before: Smolenski, P.J., and Murphy and Davis, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(c), and possession of a controlled substance with intent to deliver, MCL 333.7401(2)(c). Defendant was sentenced to three years and four months to fifteen years for each count of criminal sexual conduct and two to four years for possession with intent to deliver a controlled substance. We affirm.

Defendant argues that the trial court improperly admitted other bad acts evidence under MRE 404(b) because the evidence was not admitted for a proper purpose, was not relevant, and was substantially more prejudicial than probative. To be admissible, the bad acts evidence must be relevant and must be offered for a purpose other than to establish the defendant's character or propensity to commit the crime, and its probative value may not be substantially outweighed by the danger of unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). We review the trial court's decision to admit such evidence for a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). We find none.

A proper purpose for admission of other bad acts evidence is to show that a defendant implemented a common plan, scheme, or system in carrying out the charged and uncharged acts. *People v Sabin (After Remand)*, 463 Mich 43, 61-64; 614 NW2d 888 (2000). If so, the "evidence of similar misconduct is logically relevant to show that the charged act occurred." *Id.* at 63. Admissibility requires "such a congruence of common features that the uncharged and charged acts are naturally explained as individual manifestations of a general plan," but "distinctive and unusual features are not required" so long as the evidence supports "the inference that the defendant employed the common plan in committing the charged offense." *People v Hine*, 467 Mich 242, 251-253; 650 NW2d 659 (2002).

Here, all of the testimony of prior bad acts was introduced to show a common scheme that involved providing women with a controlled substance hidden in an alcoholic beverage in order to incapacitate them, sexually assault them, and limit their ability to remember the assault later. This is a proper purpose other than to show defendant's character and propensity to commit the crime. All of the other bad acts witnesses testified that defendant gave them alcohol drinks that he prepared. They all testified that they drank only small amounts of the drinks, passed out, and had difficulty recalling the evening. They all testified that they felt different from the way drinking only alcohol would make them feel. Notwithstanding one witness's testimony that they did not have sex, the evidence was relevant and supports an inference that defendant employed a common scheme of drugging women without their knowledge.

Defendant argues that it should nevertheless not have been admitted under MRE 403 because its probative value was substantially outweighed by the danger of unfair prejudice. We disagree. All damaging evidence is prejudicial to some extent. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995). Unfair prejudice results only if the evidence is likely to be given undue weight by the jury or the probative value is substantially outweighed by the danger of unfair prejudice. *Id.* The applicability of MRE 403 "is 'best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony.'" *Sabin, supra* at 71, quoting *People v VanderVliet*, 444 Mich 52, 81; 508 NW2d 114 (1993). As in *Sabin*, defendant's defense was essentially one of fabrication: in *Sabin*, the defendant contended that no sexual penetration occurred; here, defendant contended that the sexual penetration was consensual. Likewise, the evidence, although potentially prejudicial, was directly probative of a system defendant used to commit sexual assaults, so it rebutted the claim of consent. The trial court did not abuse its discretion in concluding that the prejudice to defendant did not substantially outweigh the probative value. In summary, the trial court did not err in admitting the other bad acts evidence.

Defendant next argues that there was insufficient evidence to convict him of possession with intent to deliver because there was no proof that he ever had possession of the drug or delivered it to the victims. We disagree.

When reviewing a claim of insufficient evidence, we must "view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999) (citations omitted). Possession can be shown by actual, physical possession, or it can be shown by constructive possession. *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992), modified 441 Mich 1201 (1992). Possession may be proved by circumstantial evidence and all reasonable inferences from that evidence. *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000).

The victims testified that defendant poured them a red punch drink that made them feel drugged. Defendant admitted that he prepared the drink. One of the victims tested positive for the presence of the drug in her system the following day and testified that she had not taken it of her own volition. A cup containing a red liquid was found in the refrigerator in defendant's room, and it also tested positive for the drug. Viewing that evidence in a light most favorable to the prosecution, a rational trier of fact could infer that defendant had possession of the drug when it was given to the victims. The testimony of the other witnesses with similar experiences bolsters that conclusion because it shows defendant's knowledge of the drug in the drink. The circumstantial evidence was sufficient to prove defendant had actual possession of the drug.

Defendant finally argues that there is insufficient evidence to convict him of third degree criminal sexual conduct because the witnesses' poor recollection of the evening renders their testimony unreliable. We disagree. Defendant effectively urges us to find their testimony not credible, but credibility is an issue of weight for the jury; we may not interfere with that role. *Wolfe, supra* at 513-515. The victims testified that they drank the drinks defendant gave them, passed out, and awoke to find defendant penetrating them. They both went to the hospital the next day, where doctors found medical evidence consistent with their testimony that they did not consent to the sexual contact. One victim had Valium in her system the following day and a cup with Valium was found in the refrigerator in the hotel room that defendant had rented. Other witnesses testified that they had had similar experiences with defendant. The jury could choose to believe the witnesses' stories, in which case it could reasonably conclude that defendant had knowledge or reason to know they were incapacitated when he initiated sexual activity. The evidence was sufficient.

Affirmed.

/s/ Michael R. Smolenski

/s/ William B. Murphy

/s/ Alton T. Davis